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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSHUA GRAHAM PACKER,

Defendant and Appellant.

2d Crim. No. B239222
(Super. Ct. No. 2009041265)
(Ventura County)

In an amended complaint, Joshua Graham Packer was charged with: count 1, felony assault by means likely to produce great bodily harm on Imelda Kemblowski (Pen. Code, § 245, subd. (a)(1)) and count 2, misdemeanor battery on Ryan De Leon (§ 242).¹ He received two years in state prison and concurrent terms in county jail.

In the first trial, a jury found Packer guilty on the misdemeanor battery count, but failed to reach a verdict on the felony assault count. In a second trial, a jury convicted Packer of felony assault by means likely to produce great bodily harm. We affirm.

¹ All statutory references are to the Penal Code.

FACTS

On November 7, 2009, Packer was a patient in the Ventura County Medical Center because of injuries received in a motorcycle accident. He was receiving intravenous medication for pain and pain pills. Packer called the nurse's station to request more pain pills. The nurse told him it was not yet time for more pills. This upset Packer. The nurses informed Packer's doctor about Packer's request, but the doctor did not order more pain medication. Later, Packer went to the nurse's station several times complaining about pain. The nursing staff called security because Packer was agitated. Packer returned to his room.

Security guards, Imelda Kembrowski and Ryan De Leon, went to Packer's room along with two nurses, Nora Toledo and Deena Pace. Packer was lying on the bed with a pillow covering his eyes. Toledo told him she brought more pain pills and also security. Packer immediately sat up in bed and began screaming, "Get the fuck out of my room. I'm going to kill you." Packer jumped out of bed, ripped the "IV" out of his arm and confronted the security guards.

Packer threw punches at De Leon and pushed him. Packer used his left arm to put De Leon in a headlock. De Leon used his right arm to put Packer in a headlock. Packer and De Leon were in a joint headlock with both of their faces looking down.

Kembrowski was able to separate the men by putting her arms around Packer's shoulders and pulling. Once separated, however, Packer turned his attention to Kembrowski.

Packer grabbed Kembrowski by her waist and lifted her up to his shoulder. She was horizontal with her face looking at the floor. Packer grabbed her legs and threw her down from his shoulder onto the linoleum-tiled floor. She landed on her left shoulder. As soon as Kembrowski hit the ground, Packer fell on top of her. De Leon in turn fell on top of Packer in an almost domino-like fashion.

Pace testified that Packer, using the strength of his body and a twisting motion with his torso, threw himself and the security guards to the ground. They fell

sideways. Kemblowski was on the bottom when they fell with Packer and De Leon falling on top of her.

Defense

De Leon testified that he and Packer had their arms around each other's necks. Kemblowski was trying to control Packer when they all fell backwards. Kemblowski landed on the floor. Packer and De Leon landed on top of her.

DISCUSSION

Packer contends the prosecution should have been required to select the act that constituted the charged offense.

In proceedings before the grand jury, and in the first trial, the prosecutor specified the assault by means likely to produce great bodily injury occurred when Packer picked Kemblowski up over his shoulder and threw her down onto the floor. But not everyone in the first trial testified Packer picked up Kemblowski and threw her down.

Prior to the second trial, Packer argued that a number of acts during the altercation could support the charge. Packer urged the court to prohibit the prosecution from relying on any other act than picking Kemblowski up over his shoulder and throwing her to the ground.

The court refused to bar the prosecutor from arguing to the jury that more than one act supported the charge. The court required, however, that the prosecutor identify those acts and ruled that a unanimity instruction must be given.

The prosecutor agreed with the court and said its theory of the case was that during the altercation Kemblowski was forced to the ground against her will and that two adult males fell on top of her.

The trial court gave the jury a unanimity instruction. The trial court also instructed that Packer is not guilty if he acted without the required intent, but instead acted accidentally.

Packer relies on *People v. Castro* (1901) 133 Cal. 11. There, the defendant was charged in the information with a single count of rape committed on June 30, 1899. The prosecution's evidence was that the defendant raped the victim four times over a

period of several months. None of the rapes occurred on June 30, 1899. The court held that on the defendant's demand, the prosecution should have been required to select the particular act upon which it relies to support the charge. (*Id.* at p. 13.) Even in the absence of the defendant's demand, when the case went to the jury, the court should have directed the jury to the particular act that the prosecution had to establish by the evidence. (*Ibid.*)

But this case is not like *Castro*. The evidence here did not show four separate assaults occurring over a period of several months, none of which occurred on the date specified in the information. Instead, the evidence here showed the assault occurred during a single altercation lasting at most a few minutes.

In any event, prior to the second trial, Packer demanded that the prosecution disclose the acts upon which it would rely. The prosecution replied that during the altercation Kemblowski was forced to the ground against her will and that two adult males fell on top of her. That is a sufficient disclosure.

Packer's reliance in *People v. Diedrich* (1982) 31 Cal.3d 263, 281, is also misplaced. There, two separate violations were proved for a single count of bribery. The trial court refused to give a unanimity instruction. The court, citing *Castro*, held it was error not to give the instruction or require the prosecution to disclose on which act it was relying. Here, the prosecution disclosed the acts on which it was relying and a unanimity instruction was given.

Moreover, the court in *Diedrich* pointed out that there is an exception to the *Castro* rule where there exists a continuous course of conduct. (*People v. Diedrich, supra*, 31 Cal.3d at p. 281.) One of the cases *Diedrich* cites is *People v. Mota* (1981) 115 Cal.App.3d 227.

In *Mota*, the evidence for one count of rape was that the defendant assaulted the victim three or four times over a short period of time. The court held the prosecution was not required to elect "' . . . where the acts complained of were perpetrated on the same occasion and within a few minutes of each other, and constituted one continuous felonious act.' [Citations.]" (*People v. Mota, supra*, 115 Cal.App.3d at p.

233.) Here, there was a single continuous altercation that only lasted a minute or two. The continuous course of conduct exception to the *Castro* rule applies.

Packer cites no authority prohibiting the prosecutor from changing his theory of the case from the theory presented to the grand jury and at the first trial.

The judgment is affirmed.

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GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Patricia M. Murphy, Judge
Kent M. Kellegrew, Judge
Superior Court County of Ventura

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